

***Considerations in Establishing A Court Policy Regarding the Use of
Wireless Communication Devices***

A. Devices Covered

There are an ever-growing number of wireless communication devices that have the capability of recording and/or transmitting sound, pictures, and video. These devices include cell phones, camera phones, personal data assistants (PDAs), BlackBerrys and laptop computers. All of these devices are also capable of wireless internet access, and many have speakerphones included. The devices may be used in a manner that is undetectable. In addition, stenotype equipment used by official or contract court reporters may utilize wireless technology.

B. Present Prohibitions on Broadcasting or Taking Pictures in the Courtroom

Presently there are two sources of policy regarding the taking of pictures or broadcasting of proceedings in courthouses: Rule 53 of the Federal Rules of Criminal Procedure, and the Judicial Conference policy on cameras in the courtroom. Rule 53 provides:

Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Judicial Conference policy states that courtroom proceedings in civil and criminal cases in the district courts may not be broadcast, televised, recorded, or photographed for the purpose of public dissemination. This policy is set forth in the *Guide to Judiciary Policies and Procedures*, vol.1, ch. 3, part E.

Specific exceptions in the guidelines permit the use of cameras and other equipment for any purpose during ceremonial proceedings, including naturalization proceedings or a judge's investiture. In non-ceremonial proceedings, audio and audio-visual equipment may be utilized only for the limited purposes of presentation of the evidence, perpetuation of the record of the proceedings, and security.

Finally, Judicial Conference policy allows a judge to use audio-visual equipment “for other purposes of judicial administration.” One example of the judicial administration exception would permit closed circuit television linking the courtroom with another location where a disruptive defendant has been detained.

The rule and the policy were adopted prior to the development and widespread use of wireless portable communication devices. The main intent was to address issues relating to coverage of court proceedings by the media. However, the prohibitions apply equally to private individuals using the new devices, and this presents a number of novel issues.

C. Issues Raised by Portable Communication Devices

1. Security Risks

These devices present security issues because some of these common devices can be converted for use as weapons. However, it is important to note that if the security screening process is done correctly, devices of this nature can be detected and kept from entering the building and, thus, in the view of security experts, they do not pose a significant security risk. Clear evidence of this is the fact that with all the present intense security concerns at airports, passengers are still allowed to carry portable communication devices aboard planes after passing through the screening process.

2. Considerations Favoring Entry of Devices

- a. It is estimated that there are 170 million cell phones in use in the United States today. It is very likely, therefore, that a number of individuals seeking to enter the courthouse will be carrying cell phones or some similar wireless portable communications device. It is also estimated that, by 2006, 80% of the phones sold in the United States will be camera phones. The level of restrictions on entry and use of these devices may well determine the level of burden placed on the court security officers and the public's right of access to the courthouse.
- b. Many attorneys find that these portable communication devices are essential to their practice. Payphones are no longer readily available in most courthouses since they are no longer economically viable as a result of cell phone usage. Although courts are permitted to provide free local phone service, the number of such phones is usually limited and attorneys need a method of quickly communicating with their offices, their clients, and witnesses.
- c. Electronic courtrooms are becoming increasingly common, and often attorneys must bring in laptop computers in order to present their case on electronic evidence display systems.
- d. Many courts are located in buildings with other tenants, such as the Social Security Administration or postal offices. Any policy adopted by a court will also impact citizens who are seeking access to the building for other types of business. This is a particularly important consideration in those facilities where court security officers are providing lobby entry screening for all tenant agencies.

- e. Stenotype wireless systems allow the court reporter to move about the courtroom and to attend a sidebar without being tethered to a wire.
- f. In some courts, judges use instant messaging to communicate with courtroom deputies and pre-trial and probation officers who are using portable wireless devices such as Blackberrys.
- g. Some accommodation needs to be made for the press to bring in laptops, cell phones, and other wireless devices when appropriate.

3. Considerations Favoring Restrictions on Entry of Devices

The use of these devices can also have a detrimental impact on court proceedings in the following ways:

- a. Surreptitious filming, photographing, recording or transmitting of court proceedings outside of the courtroom in violation of prohibitions. This has happened in some state courts, with photos being published in the newspaper or on the Internet.
- b. Taking of pictures of jurors, witnesses, or undercover agents which may be used to intimidate or bring harm to these individuals.
- c. Disruption of court proceedings by noises emitted by these devices when someone is being contacted (even when the device is in silent mode) or individuals responding to calls in the courtroom. This has happened in courthouses even when there is a requirement that these devices be turned off, and judges have fined or even jailed offenders to prevent reoccurrences.
- d. Use of cell phones by jurors during deliberations, which resulted in fines.
- e. Use by jurors of laptop computers or other devices with Internet access to research issues or even access court files during the course of a trial.
- f. Use of cell phones on standby status have produced interference with court digital tape recording systems.
- g. Courts should also be aware that electronic devices are now available that can effectively jam any attempts at communications from the courtroom to the outside or provide notice when any wireless portable communication device is turned on in the courtroom if that is prohibited by the court's policy. It is not clear whether the legal prohibition on the private use of

jamming devices would be applicable to use by courts. Devices which detect use of cell phones, etc. are not under any legal restrictions. There is no funding available for these types of devices. Stenotype wireless communication between a court reporter's stenotype machine and computer may be intercepted or jammed by these type of devices resulting in the broadcast of the proceeding or the loss of the record.

D. Types of Rules Adopted by Courts

Federal courts have adopted a variety of rules to address the entry and use of these devices in federal courthouses. Among the variations are the following:

1. All devices for anyone coming into the courthouse are allowed entry after screening, but their use is limited in the courtrooms. Some courts require that all cell phones be turned off, while others allow the phones to be left on, but in vibrate mode. The devices can be used in the halls and other public places in the courthouse.
2. All devices are banned, and all seeking to enter the building, except judges, clerk's office and chambers personnel, and probation and pre-trial officers, are required to either store the devices with the court security officers or, if storage is not provided, leave the building and store the device elsewhere. Attorneys with laptops necessary for evidence presentation must have permission from the court to bring these devices in.
3. Only certain devices are banned from the courthouse, usually cell phones with cameras, and these are either checked or the individual is directed to leave the building.
4. The general public is banned from bringing in any of these devices, but exceptions are made for attorneys, jurors, and court contractors, such as contract court reporters or interpreters. A check of picture identification, and perhaps an authorized roster, may be necessary to effect this policy. Jurors are allowed to use cell phones or laptops while in the jury assembly room so they may be productive while they wait to be called, but these devices are not allowed in the jury deliberation rooms.

E. Adopting A Court Policy Regarding Portable Communication Devices

Courts should work closely with the district U.S. marshal and the judicial security

inspector responsible for courthouse security in developing a policy regarding portable communication devices in the courthouse. Court security committees are well suited to this task and should take the lead in policy development.

In developing the court's policy, the court should seek to clearly define:

- a. The devices to which the policy applies;
- b. The manner in which the policy will apply to the various types of persons entering the courthouse and courtrooms, e.g., court personnel, law enforcement personnel, public defenders and assistant U.S. attorneys, contract court reporters and interpreters, attorneys, jurors, and the general public;
- c. The effect the policy will have on access to the courts for the general public, and especially family and friends of litigants or defendants;
- d. The effect the policy will have on other tenants in the building and visitors to these tenants; and
- e. The court administration implications of banning the entry of certain devices, including:
 - (1) the impact on the workload of court security officers¹;
 - (2) the extent of the delay in entry to the building that may result from the denial of entry process;
 - (3) the need and feasibility of providing storage facilities in the courthouse for these devices and the process for returning devices to building entrants and dealing with any complaints of damage or liability issues relating to the devices which may arise;
 - (4) if no storage facilities for these devices can be provided, the manner of dealing with entrants who cannot simply store the device in their nearby cars or offices because neither of these options is available to them; and
 - (5) for stenotype wireless equipment, that the court reporter only use point-

¹ No additional Court Security Officer resources can be made available for any increased workload associated with a particular court's policy.

to-point configurations, following all vendor configuration instructions to ensure the confidentiality and integrity of court proceedings.

Whatever policy is adopted, there should be ample notice provided by signs posted outside the courthouse and at the security posts, and the policy should be included prominently on the court's web site and in notices provided to attorneys and jurors. The court security officers should be apprised of both the letter and spirit of the policy by the USMS judicial security inspector (JSI), who is the contracting officer's technical representative for the court security officer program and integral to implementing this program. The court security officers are contract employees, and should only receive their working procedures from their supervisors, who receive it from the JSI. It is important that the JSI provides the contractor with a written copy of the policy, and that the Post Orders and training describe clearly what actions the court security officers are to take.